TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 125

FRED T LEY & CO., INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED MAY 25, 1926

(31,229)

(31,229)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 506

FRED T. LEY & CO., INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 21, 1925

[fol. 1] **IN THE COURT OF CLAIMS**

No. C-932

FRED T. LEY & COMPANY, INC.,

v.

THE UNITED STATES

I. PETITION—Filed August 1, 1923

To the Honorable the Court of Claims:

The claimant, Fred T. Ley & Company, respectfully represents:

I. That it is a corporation organized under the laws of the Commonwealth of Massachusetts with its office and principal place of business in the city of Springfield.

II. On or about the 11th day of June, 1917, claimant was notified that it had been awarded the work of constructing the cantonment that was to be known as Camp Devens, Massachusetts, and thereafter, to wit, on or about June 29, 1917, it entered into formal written contract in the emergency form with the United States represented by Major W. A. Dempsey as contracting officer for the construction of the cantonment and buildings known as Camp Devens, Massachusetts. Copy of said contract is hereto annexed as Exhibit "A" and made a part hereof.

III. Immediately upon notification of award and at the request of the War Department or its agents and representatives, the claimant entered upon the work of construction and by the 19th day of [fol. 2] June, 1917, had upwards of 1,000 men engaged upon such work, which number was being rapidly increased every day. Under instructions and with the approval of the constructing quartermaster assigned to the work as the representative of the contracting officer, claimant took out policies of insurance with the Massachusetts Employees Insurance Association, a mutual concern, whose name was later changed to the Liberty Mutual Insurance Company. This insurance indemnified the claimant as agent of the United States for the performance of this work against liability to the public for personal injuries which might be sustained by the general public upon the work under the contract.

IV. The public interests were such as to require that the work of constructing Camp Devens be carried forward with the utmost haste and the emergent character of the work involved the sacrifice of all other considerations to that of speed. It was therefore necessary to do many things with less regard to safety of life and limb than would have been requisite under ordinary conditions. Claimant was obliged to employ many persons to assist in such work and a large

number of persons other than the employees of the claimant as agent for the United States were necessarily in and upon the military reservation at Camp Devens while this work was going on, and were thus subject to a greater or less degree to danger of injury by operations under the contract carried on under the circumstances aforesaid. Such injury to the general public would generally subject the contractor as agent for its principal to the payment of damages. The liquidation of the sums due thereon might have required many years of negotiation and litigation. In order that the financial relations between the contractor and the United States might be dis- [fol. 3] posed of promptly and not remain open until the settlement of all such questions, it was necessary that public liability insurance should be taken out whereby for payment of a fixed sum all such costs, expenses and charges would be assumed by the insurer. These were the reasons impelling the authority to claimant to take out such insurance policies, and the claimant in taking them out and incurring the expense therefor.

V. After the claimant had incurred its obligations to the Massachusetts Employees Insurance Association, later the Liberty Mutual Insurance Company aforesaid, objection was made in the Construction Division of the War Department having supervision of this work to the government paying such insurance costs on the ground that the government should itself assume the risks involved. Shortly thereafter, however, to wit, about the first of September, 1917, the Chief of Construction Division, who was then also the contracting officer, decided that public liability insurance was a proper service for the cantonment contractors to engage and that the cost thereof was a proper item of cost under the form of cantonment contract, including the contract had by claimant. On October 3, 1917, a letter was written by authority of the Secretary of War by Colonel I. W. Littell, Quartermaster Corps, U. S. A., then in charge of cantonment construction for the War Department, to the contracting officer in succession, Major W. A. Dempsey, instructing him to advise the Comptroller of the Treasury that the policy of liability insurance theretofore taken out by the contractor for the work of building cantonment at Camp Grant had been taken out by the contractor with the approval of the constructing quartermaster, acting upon the instructions of the officer in charge of cantonment construction in the [fol. 4] office of the Quartermaster General of the Army, and submit to the Comptroller the question of whether such premium could be reimbursed. Failing to obtain a decision by the Comptroller by that course, the contracting officer thereafter made a certificate in the substantial identical case of Mason & Hanger Company under an exactly similar contract for construction of Camp Zachary Taylor approving the action of that contractor of taking out policies of public liability insurance and authorizing the Quartermaster to reimburse said company for the cost of premiums paid thereon. The constructing quartermaster submitted to the Comptroller the question of his right to reimburse Mason & Hanger the cost of such premiums and the Comptroller decided that such approval was not sufficient to

permit payment. The action so taken by the contracting officer in that case was intended to open the way to payment of all similar costs under other and similar cantonment contracts, but in consequence of said decision of the Comptroller, the Chief of the Construction Division of the War Department thereafter refused to issue like certificates in other cases, including the case of claimant under the Camp Devens contract. Claimant alleges that its action in taking out the liability insurance in the first instance was with the approval of the constructing quartermaster acting for the contracting officer and that the costs reasonably and necessarily incurred by it on account of such insurance were in effect ratified and approved by the contracting officer after their incurrence as a proper and legitimate cost of the work done under the Camp Devens contract. But for the action of the Comptroller in declining to sanction payment of such expense, the contracting officer would have formally approved and paid such costs.

[fol. 5] VI. The amount of premiums paid by claimant for public liability insurance, exclusive of dividend returns, amounted to $10,190.15, which was reasonable and just and no part of which has been reimbursed to the claimant. This expense was reasonable and necessarily incurred under and on account of the work done in constructing the cantonment known as Camp Devens. By reason of the facts aforesaid and under Article II, sub-paragraph (h), a claim has accrued to the claimant against the United States for reimbursement of the full sum paid by it as costs of necessary liability insurance. Article II, subparagraph (h) of the contract referred to is as follows:

"(h) Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the Contracting Officer to have been actually sustained (including settlements made with the written consent and approval of the Contracting Officer) by the Contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the Contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the Contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the Contractor, but not for the purpose of determining the Contractor's fee, except as hereinafter provided."

VII. A claim was presented to the board of contract adjustment representing the Secretary of War for reimbursement of the costs herein claimed, but such claim was disapproved on the ground that except with the sanction of the Comptroller General reimbursement of costs of this character could not be made by the War Department. [fol. 6] VIII. No other action has been had on said claim in Congress or by any of the departments; no person other than the claim-

ant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims $10,190.15.

King & King, Attorneys for Claimant.

Sworn to by George R. Shields. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO PETITION

[NOTE.—Parts of Exhibit "A" not printed because immaterial to any issue involved are as follows: Parts of Art. II; part of Art. III; all of Art. V; part of Art. VI; all of Arts. VII, VIII, X, XI, XII, and XIII, and Schedule of Rentals. Contract in full is on file with petition.]

Contract for Emergency Work

Construction of Cantonment at Ayer, Mass.

Contract made and concluded this 14th day of June, 1917, by and between Fred T. Ley & Company, of Springfield, Mass., a corporation organized under the laws of the State of Massachusetts, represented by Harold A. Ley, its president, party of the first part (hereinafter called Contractor), and the United States of America, by Major W. A. Dempsey, Q. M. U. S. R. (hereinafter called Contracting Officer), acting by authority of the Secretary of War, party of the second part.

Whereas, the Congress having declared by Joint Resolution approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and the United States urgently requires the immediate performance of the work hereinafter described, and it is necessary that said work shall be completed within the shortest possible time; and

[fol. 8] Whereas, it is advisable under the disturbed conditions which exist in the contracting industry throughout the country for the United States to depart from the usual procedure in the matter of letting contracts and adopt means that will insure the most expeditious results; and

Whereas, the Contractor has had experience in the execution of similar work, has an organization suitable for the performance of such work, and is ready to undertake the same upon the terms and conditions herein provided:

Now, therefore, this contract, witnesseth, That in consideration of the premises and of the payments to be made as hereinafter provided, the Contractor hereby covenants and agrees to and with the Contracting Officer as follows:

Article I

Extent of the Work.—The Contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

At Ayer, Massachusetts

Buildings and other utilities, except roads, stoves, bunks, mattresses, ranges and refrigerators, for an infantry Division including the following additional units, viz:

1 Aero Squadron,
1 Balloon Company,
1 Telegraph Battalion, Signal Corps,
1 Regiment, Heavy Artillery, horse drawn,

in accordance with the drawings and specifications to be furnished by the Contracting Officer, and subject in every detail to his supervision, direction and instruction.

The Contracting Officer may, from time to time, by written instructions or drawings issued to the Contractor, make changes in said [fol. 9] drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications and additions with the same effect as if they were embodied in the original drawings and specifications. The Contractor shall comply with all such written instructions or drawings.

The title to all work completed or in course of construction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the Contracting Officer, all machinery, equipment, hand tools, supplies and materials, for which the Contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of the United States. These provisions as to title shall not operate to relieve the Contractor from any duties imposed hereby or by the Contracting Officer.

Article II

Cost of the Work.—The Contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the Contracting Officer and as are included in the following items:

* * * * * * *

(h) Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the Contracting Officer to have been actually sustained (including settlements made with the written consent and approval of the Contracting Officer) by the Contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the Contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the Contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included [fol. 10] in the cost of the work for the purpose of reimbursement to the Contractor, but not for the purpose of determining the Contractor's fee, except as hereinafter provided.

* * * * * * *

(k) Such other items as should in the opinion of the Contracting Officer be included in the cost of the work. When such an item is allowed by the Contracting Officer it shall be specifically certified as being allowed under this paragraph.

* * * * * * *

Article III

Determination of Fee.—As full compensation for the services of the Contractor, including profit and all general overhead expense, except as herein specifically provided, the Contracting Officer shall pay to the Contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

* * * * * * *

The total fee to the Contractor hereunder shall in no event exceed the sum of $250,000, anything in this agreement to the contrary notwithstanding.

Article IV

Payments.—On or about the seventh day of each month the Contracting Officer and the Contractor shall prepare a statement showing as completely as possible: (1) the cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the Contracting Officer up to and including such last day and (3) an amount equal to three and one-half per cent (3½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the Contractor's fee; and the Contractor at such time shall deliver to the Contracting Officer original signed payrolls for labor, original invoices for materials purchased and all other original papers not theretofore de-

livered supporting expenditures claimed by the Contractor to be included in the cost of the work. If there be any item [fol. 11] or items entering into such statement, upon which the Contractor and the Contracting Officer can not agree, the decision of the Contracting Officer as to such disputed item or items shall govern. The Contracting Officer shall then pay to the Contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding three and one-half per cent (3½%), as the Contracting Officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The Contracting Officer may also make payments at more frequent intervals for the purpose of enabling the Contractor to take advantage of discounts at intervals between the dates above mentioned of for other lawful purposes. Upon final completion of said work the Contracting Officer shall pay to the Contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof.

* * * * * * *

Article VI

Special Requirements.—The Contractor hereby agrees that it will:

* * * * * * *

(c) Procure, and thereafter maintain such insurance, in such forms and in such amounts, and for such periods of time as the Contracting Officer may approve or require.

* * * * * * *

Article IX

Bond.—The Contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the Contracting Officer, [fol. 12] in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00), conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the Contractor.

* * * * * * *

Article XIV

Settlement of Disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the Contractor shall consider himself prejudiced by any decision of the Contracting Officer made under the provisions of Article IV hereof, the matter shall be referred to the Officer in Charge of Cantonment Construction for determination. If, however, the Contractor shall feel aggrieved by the decision of the Officer in Charge of Cantonment Construction, he shall have the right to submit the same to the Secretary of War whose decision shall be final and binding upon both parties hereto.

Article XV

This contract shall bind and inure to the Contractor and its successors.

It is understood and agreed that wherever the words "Contracting Officer" are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the Contracting Officer may be assigned by the Secretary of War and any duly appointed representative of the Contracting Officer.

Witness the hands of the parties hereto the day and year first above written, all in triplicate.

Fred T. Ley & Co., Inc., by Harold A. Ley, President.
United States of America, by W. A. Dempsey, Contracting Officer.

[fol. 13] II. General Traverse.—Entered Oct. 1, 1923

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and Submission

On April 14, 1925, this case was argued and submitted on merits by Mr. George A. King, for the plaintiff, and by Messrs. O. R. McGuire and John E. Hoover, for the defendant.

[fol. 14] **IV. Findings of Fact, Conclusion of Law and Memorandum by the Court**—Entered May 4, 1925

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

Plaintiff is a corporation organized under the laws of the State of Massachusetts, with its principal office in the city of Springfield.

II

Under date of June 14, 1917, plaintiff entered into a contract with the United States, represented by Major W. A. Dempsey, Q. M., U. S. R., as contracting officer, covering the construction on a cost-plus basis of certain cantonment buildings at Camp Devens, near Ayer, Massachusetts. A copy of the material parts of said contract is annexed to the petition herein as exhibit "A" and is by reference made a part of this finding. The contract was identical in form and provisions, except as to the work to be done thereunder, with contracts made at or about the same time for fifteen other cantonments in other parts of the United States, one of these being the contract involved in the case of Mason and Hanger Company, 56 C. Cls. 238.

III

Major W. A. Dempsey was the contracting officer of the Government at and before the date of the contract and until July 27, 1917. He was then succeeded as such contracting officer by Colonel I. W. Littell, who remained as contracting officer until February 12, 1918, at which time he was in turn succeeded by Colonel R. C. Marshall, jr. (later brigadier general). Colonel Littell was also the officer in charge of cantonment construction up to the time he was relieved as contracting officer by General Marshall. The constructing quartermaster at Camp Devens was Captain Edward Canfield. Directly after entering upon the work plaintiff, in accordance with its usual practice, took out a policy of insurance covering public liability insurance and continued to carry same and paid premium costs thereof during the continuance of the work under [fol. 15] the contract. On June 23, 1917, the officer in charge of construction, in a communication to plaintiff, informed plaintiff that it should carry such insurance as the contracting officer might direct and that the Government would carry its own risk against fire and public liability damage. The contracting officer disapproved of the action of the contractor in taking out liability insurance and notified plaintiff that he did not consider the cost of such insurance a proper item in the cost of the work.

IV

On June 28, 1917, a telegram or night message was addressed by the contracting officer, Major Dempsey, to plaintiff and to each of the other fifteen contractors, notifying them to obtain insurance protecting their material against fire between the time of delivery by the carrier and acceptance by the Government, and also such workmen's compensation insurance as was required by the statutes, and further stating that other insurance risks were assumed by the Government and that the Government would not assume responsibility for losses and expenses resulting from the contractor's fault or neglect. Subsequent to this night message, and on July 5, 1917, plaintiff inquired of the constructing quartermaster whether or not the public liability insurance then in force should be canceled or whether such risk should be assumed by plaintiff. On July 9, 1917, the officer in charge of cantonment construction wrote to the constructing quartermaster at Camp Devens, calling his attention to the fact that the contract provided that insurance should be approved by the contracting officer and not by the constructing quartermaster.

V

On or about August 8, 1917, the constructing quartermaster sent the officer in charge of cantonment construction several policies which had been taken out by the plaintiff and which had been delivered to the constructing quartermaster, among which were the public liability insurance policies taken out by the plaintiff, as hereinbefore stated. These policies for public liability insurance were returned to the constructing quartermaster on or about August 10, 1917, disapproved on account of that form of insurance not being authorized, and this disapproval was communicated to the plaintiff on or about August 13, 1917. These policies ran from month to month and carried a clause authorizing the cancellation within a limited period stated. In their letter of July 25, 1917, transmitting policies, as above stated, to the constructing quartermaster, plaintiff gave a list of the insurance policies, two of which were for workmen's compensation liability, two for teams' liability damage, one for safe burglary, one for paymaster robbery, and two being policy CO-86, "expiring July 19, 1917," and policy CO-107, "expiring August 19, 1917," for public liability. These were the policies that were forwarded, as above stated, to the officer in charge of cantonment construction, and were returned on August 10 with the statement that they were not approved.

On August 24, 1917, plaintiff wrote the officer in charge of cantonment construction, expressing regret at the decision that public [fol. 16] liability insurance would not be authorized and urging that it be approved. The Government officers adhered to their decision, and on August 31, 1917, plaintiff wrote to the officer in charge of cantonment construction claiming that the first set of policies had been taken out and authorized by the constructing quartermaster, and

also added that the second set of policies expired on August 19, and were not renewed at the expense of the Government because of the orders received from the officer in charge of cantonment construction. In reply to this letter the officer in charge of cantonment construction on September 4, 1917, wrote to plaintiff, calling attention to the telegram of June 28, 1917, and stating that under the conditions mentioned in that telegram he could not understand why the policies for public liability and other insurance were not immediately canceled in spite of the claimed authorization by the constructing quartermaster. This letttr was responded to by the plaintiff on September 6 with the explanation of the alleged authorization by Captain Canfield and added: "We sincerely trust we will secure your approval to carry public liability insurance." A number of communications passed between the parties on the same general subject of public liability insurance, with the result that the contracting officer declined to approve the taking out of policies covering the same.

VI

The actual cost incurred and paid by the plaintiff on account of public liability insurance under the said contract from June 14, 1917, to December 31, 1917, including the liability insurance policies CO-86 and CO-107 and four other policies, amounted to $10,190.15, no part of which has been paid back to the plaintiff.

VII

The evidence fails to show that the public liability insurance taken out by the plaintiff was ever required, approved or ratified by the defendant's contracting officer or his successor in office or any other person to whom the duties of the contracting officer were assigned by the Secretary of War, or by any duly appointed representative of the contracting officer.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the clerk and collected by him according to law.

Memorandum

The plaintiff claims reimbursement of the cost of policies of public liability insurance which were carried for the protection against claims for injuries sustained by the public on the work done under a contract with the Government of June 14, 1917. This contract [fol. 17] was one of sixteen cantonment contracts of similar form

and requirements, except as to the work, and was a contract with similar provisions to that involved in the Mason and Hanger Company case, 56 C. Cls. 238. In the case just mentioned it was made definitely to appear that the taking out of public liability insurance had been approved by the contracting officer. No such fact appears in the instant case. On the contrary, the contracting officer continually objected to the taking out of public liability insurance and plaintiff was so informed of the fact and continued the policy in force or to renew the same after the ruling by the contracting officer. The plaintiff frankly states that in the instant case there was "no such specific individual approval of the policy in this case as there was in the Mason and Hanger case" and adds that plaintiff relies on the approval in the Mason and Hanger case as having been intended as an approval of like action under all similar contracts. We think the approval in the Mason and Hanger case was for the purpose of submitting a question to the comptroller. But however this may be, each of these cases must stand upon its own facts. The contract authorizes insurance approved or required by the contracting officer. In the absence of any such requirement or any such approval or ratification by the contracting officer designated in this contract, the plaintiff can get no benefit from his action under some other contract and with some other contractor. The plaintiff knew almost from the inception of the work that this insurance would not be authorized. If it proceeded to carry this insurance for its own purposes it can not properly expect reimbursement. The petition is accordingly dismissed.

[fol. 18] V. JUDGMENT

At a Court of Claims held in the City of Washington, on the 4th day of May, A. D., 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and hereby is dismissed: And it is further ordered and decreed that the United States shall have and recover of and from the plaintiff as aforesaid, the cost of printing the record herein the sum of One hundred and twenty-seven dollars and ninety-six cents ($127.96), to be collected by the clerk, as provided by law.

By the Court.

VI. PETITION FOR APPEAL—Filed May 12, 1925

From the judgment in the above case decided May 4, 1925, claimant hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

King & King, Attorneys for Claimant.

VII. Order Allowing Appeal

It is ordered by the court this 12th day of May, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 19] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and memorandum by the court; of the judgment of the court; of the plaintiff's application for appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 19th day of May, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 31,229. Court of Claims. Term No. 506. Fred T. Ley & Co., Inc., appellant, vs. The United States. Filed May 25th, 1925. File No. 31,229.